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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RESORTS INTERNATIONAL, INC., a corporation organized and existing under the laws of the State of Delaware, and RESORTS INTERNATIONAL HOTEL, INC., a corporation organized and existing under the laws of the State of New Jersey,

Petitioners,

v.

NJM ASSOCIATES, A New Jersey limited partnership, doing business as the NEW JERSEY MONTHLY, NJM PUBLISHING COMPANY, a corporation organized and existing under the laws of the State of New Jersey, as a General Partner in NJM ASSOCIATES, CHRISTOPHER LEACH, Individually, as Editor-In-Chief of NEW JERSEY MONTHLY and as a general partner in NJM ASSOCIATES, HENDRIX F.C. NIEMANN, Individually and as Publisher of NEW JERSEY MONTHLY, MICHAEL ARON, Individually and as Editor of NEW JERSEY MONTHLY, MICHAEL DORMAN, and JOHN COE, MARY DOE, STEVE ROE, and other individuals as yet unknown, Names Being Fictitious, Individually and as agents, servants and/or employees of NEW JERSEY MONTHLY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Question Presented

Where a person is required, as a condition for obtaining a license to do business under state law, to prove annually his reputation and integrity by clear and convincing evidence, does he have a federally protected interest in reputation under *Paul* v. *Davis*?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT—Because this case involves substantial and far-ranging issues surrounding an individual's federal right to vindicate his reputation when it is unalterably tied to another state-created right and because the Supreme Court of New Jersey failed utterly to balance this federal right with state interests in interpreting New Jersey law, this petition should be granted	7
CONCLUSION	16
APPENDIX:	
A—Opinion of the Supreme Court of New Jersey, dated May 6, 1982	1a
B—Opinion of the Supreme Court of New Jersey, dated May 6, 1982	6a
C—Opinion of the Superior Court of New Jersey, Law Division, dated May 5, 1981	46a
D—Amended Opinion of the Superior Court of New Jersey, Law Division, dated July 1, 1981	57a
E—Order of the Superior Court of New Jersey, Law Division, dated July 7, 1981	72a
F—New Jersey Statutes Annotated 5:12-1 et seq. (New Jersey Casino Control Act)	74a

PAGE

Table of Authorities

Cases Cited

Arnett v. Kennedy, 416 U.S. 134 (1974) 13

Associated Press v. NLRB, 301 U.S. 103 (1937) 14

Board of Regents v. Roth, 408 U.S. 564 (1972) 10

Cary v. Hume, 492 F.2d 631 (D.C. Cir.), *cert.* dismissed 417 U.S. 938 (1974) 13

Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976), *cert.* den. 430 U.S. 960 (1977) 11

Cox v. Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 15

Farber, In re, 78 N.J. 259, 394 A.2d 330 (1978), *cert.* den. 439 U.S. 997 (1979) 14

Goss v. Lopez, 419 U.S. 565 (1975) 9

Herbert v. Lando, 441 U.S. 153 (1979) 14

Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), *cert.* den. 450 U.S. 913 (1981) 11

Maressa v. New Jersey Monthly, 89 N.J. 176, —— A.2d —— (1982) 2, 6, 12

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980), *cert.* den. 450 U.S. 1041 (1981) 13

New York Times v. Sullivan, 376 U.S. 254 (1964) 14

Owen v. City of Independence, 445 U.S. 622 (1979) 9

Paul v. Davis, 424 U.S. 693 (1976) ..... i, 6-9, 11, 12, 15, 16

Rainier's Dairies v. Raritan Valley Farms, Inc., 19 N.J. 552, 117 A.2d 889 (1955) 10

United States v. Lovett, 328 U.S. 303 (1946) 9

PAGE

Wisconsin v. Constantineau, 400 U.S. 433 (1975) 9

Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 14

United States Constitution Cited

First Amendment 14

Fourteenth Amendment, Section 1 ..... 3, 8

Rules Cited

N.J.S.A. 2A:84A-21 (New Jersey Shield Law) 2, 3, 5, 6, 11

N.J.S.A. 2A:84-21.1 14

N.J.S.A. 5:12-1, et seq. 4

N.J.S.A. 5:12-80(a) 4

N.J.S.A. 5:12-84 4

N.J.S.A. 5:12-87(d) 5

N.J.S.A. 5:12-88(a) 5

28 U.S.C.:

Sec. 1257(3) 3

Other Authorities Cited

33 Hastings L.J. 623, 637, n.73 (1982) 13

The Supreme Court, 1975 Term, 90 Harv. L. Rev. 86 (1967) 9

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioners pray that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of New Jersey entered in this proceeding on May 6, 1982.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported at 89 N.J. 212, —— A.2d —— (1982) and appended to this Petition as Appendix A. The opinion incorporates the reasoning of and relies on a companion case also decided by the Supreme Court of New Jersey entitled *Maressa* v. *New Jersey Monthly*, 89 N.J. 176, —— A.2d —— (1982), the opinion in which is appended to this Petition as Appendix B.

The Supreme Court of New Jersey in this proceeding reviewed decisions and an Order rendered by the Superior Court of New Jersey, Law Division. The first opinion, dated May 5, 1981, is unreported. It is appended to this Petition as Appendix C. On July 1, 1981, the trial court entered an Amended Opinion, which is reported at 180 N.J. Super. 459, 435 A.2d 572 (Law Div. 1981) and appended to this Petition as Appendix D. The Order of the Law Division from which the appeal to the Supreme Court of New Jersey was taken was entered on July 7, 1981 and is appended to this Petition as Exhibit E.

Jurisdiction

The judgment and opinion of the Supreme Court of New Jersey were filed on May 6, 1982. In them, the New Jersey Supreme Court ruled that the New Jersey Shield Law, N.J.S.A. 2A:84A-21, in its application to petitioners, did not impinge upon any right, privilege o-

immunity guaranteed them under the Constitution of the United States. The jurisdiction of the Court is therefore invoked under 28 U.S.C. §1257(3) to review a judgment rendered by the highest court of the State of New Jersey.

Constitutional Provision and Statutes

United States Constitution, Amendment XIV, Section 1:

> "... No State shall make or enforce any law which shall abridge the privileges and/or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New Jersey Statutes Annotated 2A:84A-21:

> "Newspaperman's Privilege
> Rule 27.
>
> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by a news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was pro-

cured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated. . . ."

Sections of the New Jersey Casino Control Act, New Jersey Statutes Annotated 5:12-1 *et seq.*, which are cited throughout the text, are reproduced in Appendix F.

Statement of the Case

This is a libel suit. Its subject is an article which appeared in the May 1979 issue of New Jersey Monthly magazine, a publication of respondents, concerning the circumstances surrounding the grant by the New Jersey Casino Control Commission of a plenary license to petitioners Resorts International, Inc. and Resorts International Hotel, Inc. to operate a gaming casino in Atlantic City, New Jersey pursuant to the New Jersey Casino Control Act (Act) (App. F).

Under the Act, petitioners, as applicants for a casino license, had the affirmative responsibility of establishing by "clear and convincing evidence" their qualifications, which they did. N.J.S.A. 5:12-80(a) (App. F at 74a). Such qualifications included proof of financial stability, integrity and responsibility, integrity and reputation of financial backers, investors, mortgagees and other holders of notes or evidence of indebtedness, and the honesty and integrity of the applicant itself in virtually all conceivable areas. N.J.S.A. 5:12-84 (App. F at 82a).

Thus, it was these standards which petitioners satisfied as a result of the hearings which were the subject of the article in question and annually thereafter. Under the Act, a license is issued for a term of one year (N.J.S.A. 5:12-87(d)), at the close of which an application for license renewal must be made and the same burdens met. N.J.S.A. 5:12-88(a) (App. F at 87a).

The thrust of the subject article was that the hearings conducted by the Casino Control Commission which led to the grant of a casino license were a sham, that petitioners "bought" the license with retainers and contributions of various kinds, some of them illegal, and that petitioners themselves were a "mismanaged, unscrupulous, mob-tainted company with the morals of an alley cat." (App. A at 3a).

On April 18, 1980, petitioners brought suit in the Superior Court of New Jersey, Law Division. Conceding that they were public figures, petitioners alleged that the article had been published with knowledge that it was false and in wilful or reckless disregard of the truth (App. A at 3a). In discovery, petitioners sought a wide range of information including sources for the article, notes, memoranda, rough drafts, proofs and editorial comments (App. A at 4a).

On a motion by petitioners to compel discovery, the trial court ruled on July 1, 1981 that respondents were not protected by the New Jersey Shield Law, N.J.S.A. 2A:84A-21, and that any privilege they had asserted thereunder had to give way because it had been waived and because of the nature of the allegations of libel, which the court found to be plainly substantial (App. D at 69a). It therefore held that respondents were bound to disclose the sources for their article and that their editorial processes were open to inquiry. An Order embodying the trial court's opinion

and compelling disclosure of sources and editorial processes, later stayed pending appeal, was entered on July 7, 1981 (App. F; see App. A at 4a).

On an interlocutory appeal which the Supreme Court of New Jersey, bypassing the state's intermediate appellate courts, certified directly, that court ruled that the privilege of the Shield Law was absolute, that it had not been waived and that it protected both sources for the article and respondents' editorial processes. In doing so, the New Jersey Supreme Court adopted and applied the reasoning of a companion case which was decided the same day and which involved similar issues on the sweep of the Shield Law. In *Maressa* v. *New Jersey Monthly*, 89 N.J. 176, —— A.2d —— (1982), the court recognized the existence of federal constitution considerations; it held, however, that the Shield Law was absolute in the absence of an impingement of other constitutional rights of the libel plaintiff (App. B at 18a). It further found that there was no such federally protected right involved in the case of the plaintiff in *Maressa*—and by extension in the case of petitioners—since, in the New Jersey court's view, this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), made an individual's interest in reputation merely one among many interests against which the State could protect by virtue of its tort laws (App. B at 19a).

It was before the Supreme Court of New Jersey then that the federal question, which it made central to its decision, was raised and decided. Again, it was that court's view that petitioners' reputation, and no interest it had beyond reputation, was implicated in the action. It therefore reversed the trial court's order (App. A at 5a).

REASONS FOR GRANTING THE WRIT

Because this case involves substantial and far-ranging issues surrounding an individual's federal right to vindicate his reputation when it is unalterably tied to another state-created right and because the Supreme Court of New Jersey failed utterly to balance this federal right with state interests in interpreting New Jersey law, this petition should be granted.

The petition presents a question of substantial importance and far-reaching effect involving a litigant's constitutional right to protect his reputation where much more than reputation per se is involved. Specifically, this case involves circumstances where reputation is intimately connected with a state-created right to do business; in fact, so intimate is the connection that the very right of petitioners to operate their business in the State of New Jersey is dependent on their good reputation for honesty and integrity in every conceivable respect and their ability to demonstrate it annually.

In all of this, the decision of the Supreme Court of New Jersey, while purporting to follow this Court's decision in *Paul* v. *Davis*, 424 U.S. 693 (1976), actually decided an issue left open in that case in such a manner as appears to conflict with its clear import. The court below did this in the context of its construction of the New Jersey Shield Law, which it held to be absolute in the circumstances, believing that, as noted above, no interest of petitioners outside of their reputation was involved.

The mischief that such a ruling can work is obvious. With the number of shield laws extant and with the ever-increasing and seemingly irresistible tendency of the courts and legislatures to protect the media and their sources of

information even though the Constitution in no way compels such protection, the position and due process rights of individuals who depend on reputation for their livelihood are threatened. Finally then, this case involves the question of how far a state may go when it enacts a media shield law and, more particularly, and perhaps more importantly, whether such a law may be absolute even where, as here, something more than reputation is involved.

That the decision below is fundamentally inconsistent with the holding of the Court in *Paul* v. *Davis*, that New Jersey's Shield Law as applied to petitioners is unconstitutional and that these circumstances by themselves warrant review is obvious from the real import of *Paul*.

Edgar Paul was the victim of a campaign by Kentucky County officials to alert local merchants about the possible shoplifters who might operate during the holiday season. The officials published and distributed a flyer with Paul's name and picture on its branding him a shoplifter. While Paul had once been arrested for shoplifting, the charges were unresolved at the time of the distribution of the flyer and were eventually dismissed. He sued the officials claiming their actions constituted denial of due process and, more specifically, that publication of the flyer deprived him of a liberty interest protected by the Fourteenth Amendment.

In holding that his complaint implicated no such liberty interest, the Court said that allegations of damage to reputation alone would not trigger Fourteenth Amendment protection:

> ". . . The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be pro-

> tected by state law. While we have in any number of our prior cases frequently pointed out the drastice effect of the 'stigma' which may result from damage to reputation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, *apart from some tangible interests such as employment,* is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 702. (emphasis supplied).

What the Court requires then in order for there to be a constitutional value worthy of protection is a threat to an interest more tangible than just reputation; it requires reputation "plus". See *Owen* v. *City of Independence,* 445 U.S. 622, 633 n.13 (1979); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 86 (1976). Such circumstances were, the Court in *Paul* asserted, to be found in any number of prior cases. For example, in *United States* v. *Lovett,* 328 U.S. 303 (1946), the Court overturned as an unconstitutional bill of attainder a federal law which forbade payment of salary to three employees it had found guilty of subversive activity. In this, the enactment not only "stigmatized" them—that is, damaged their reputations—it also "impaired" their opportunities to earn a living. 328 U.S. at 314. See, *e.g., Goss* v. *Lopez,* 419 U.S. 565 (1975) (reputation "plus" foreclosure from right to attend school); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1975) (reputation "plus" impairment of right to buy liquor).

The "plus" consists, of course, of a right created by the state and extended to the individual which amounts to a "legal guarantee of present enjoyment of reputation." *Paul* v. *Davis, supra,* at 711. Indeed, generally speaking, any interest may attain the status of "liberty" or "prop-

erty" under the Due Process Clause merely because it is recognized and protected by state law. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Such interest, contrary to the holding of the Supreme Court of New Jersey, is clearly present in this case. Here, petitioners attained a license to operate a gaming casino in Atlantic City, New Jersey. In doing so, they successfully bore the burden of proving their financial integrity, stability and responsibility and the integrity and reputation of their backers, investors, mortgagees and bondholders; they also demonstrated, as they had to, their "reputation for honesty and integrity" in every conceivable area—all of this, under the watchful eye of state regulatory authorities (App. F at 83a). They are thus presently entitled to enjoy and required to maintain their good reputation, and yet are faced with a law which plainly impairs that entitlement.

Moreover, it was during these very licensing hearings which figured prominently in the subject article that the New Jersey Casino Control Commission, the statutory body charged with the responsibility for licensing, questioned petitioners on what action they had taken to counteract certain media allegations, such as were reflected in the article, of ties to organized crime. The present litigation followed.

Under these circumstances, a defamation action does much more than serve the important public policies which underlie the right to bring such suits in all common law jurisdictions—that one should be allowed to enjoy his reputation free of false and defamatory attacks. See *Rainier's Dairies* v. *Raritan Valley Farms, Inc.*, 19 N.J. 552, 557, 117 A.2d 889, 891 (1955). For on their reputation *depends* petitioners' right to do business. If their reputation does not remain intact, then neither will they be able to attain the license from the state that will allow them to operate. As noted above, petitioner's license is in no way permanent.

Pursuant to New Jersey statute, they must appear annually before the New Jersey Casino Control Commission, reapply for a license, and each year bear the affirmative burden of proving good reputation.

These interests are plainly far more substantial than those found by Courts of Appeals in other cases to be sufficient to trigger the right to due process to vindicate reputation. See, *e.g.*, *Marrero* v. *City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980), *cert.* den. 450 U.S. 913 (1981) (reputation "plus" interest in the goodwill of one's business aside from investment of capital and tangible property); *Colaizzi* v. *Walker*, 542 F.2d 969, 973 (7th Cir. 1976), *cert.* den. 430 U.S. 960 (1977) (repuation "plus" failure by state to rehire even in absence of property interest in position). That much should have been obvious to the court below.

The Supreme Court of New Jersey, however, never really attempted to fathom the implications of all of this. For while expressly recognizing that the New Jersey Shield Law could be construed as absolute in protecting from disclosure confidential sources and editorial processes and that such construction raises no federal question only "absent any conflicting constitutional right," that court merely asserted there to be no such conflicting right by way of bare conclusion and an almost casual citation to *Paul* v. *Davis*. In this cryptic discussion of a question of federal law which the court recognized was central to its holding, it simply glossed over the possible state rights that were connected with petitioners' reputation, assuming as it did the citation to *Paul* was all that was necessary to dispose of the question.* That grievous error can only be rectified here.

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*In this context, it should be noted that the discussion of the federal issue was contained in the companion case to the instant

(Footnote continued on following page)

The question raised and decided in *Paul*, of course, was a relatively narrow one. The issue confronting the Court there was simply whether there was a federal right to vindicate one's reputation, without more, when it had been damaged by state action. The present case projects questions not at all touched on in, but certainly presaged by, *Paul*. These are also questions which logically flow from the Court's decision in that matter, involving as they do the kinds of interests which, when implicated along with reputation, are sufficient to invoke federal jurisdiction. It may now be time for the Court to confront this sensitive and important issue given the prominence of reputation in our society and the importance of a cause of action in defamation as a means—perhaps the only effective means—for vindicating it.

Noteworthy and novel as well is the context within which these issues are framed. Unlike *Paul*, this case arises not in a suit against public officials, but in circumstances where a statutory privilege, construed by New Jersey's highest court to be absolute, may be invalid as applied

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(Footnote continued from preceding page)

one. *Maressa* v. *New Jersey Monthly*, 89 N.J. 176, —— A.2d —— (1982) (App. B). The plaintiff in that matter stood in a far different position from petitioners in this one. A New Jersey State Senator, he apparently had no interest in his reputation comparable to that of petitioners: he had not been through a rigorous administrative hearing process in which he had the burden of proving good reputation and he was not a licensee whose right to continue in his business depended on the maintenance of his reputation and on the state's annual review of his qualifications. While it is understandable that the court considered these litigants similarly situated, incorporating as it did its decision in *Maressa* by reference in its opinion in the present matter, that circumstance only makes clear that the New Jersey Supreme Court utterly failed to give the important constitutional issues and interests raised here their due.

to a suit between private parties because it fails to take into account federal rights with which it is in conflict. And although these differences may make the projected issues significant from that point of view, they do not detract at all from the importance of the questions raised as a matter of constitutional law. The purpose of a hearing when the right to due process is infringed is to provide one the opportunity to clear his name. *Arnett* v. *Kennedy*, 416 U.S. 134, 157 (1974). That purpose is identical to the one served by actions for defamation. In both instances—in the first through action of its officials, in the second through operation of its laws—the state has threatened federal rights.

This case also has broad implications and importance far beyond its facts because of the number of media shield laws that have been enacted. As of January 1982, they were available to journalists in 26 states. Comment, Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection, 33 Hastings L.J. 623, 637 n.73 (1982).* While New Jersey's Shield Law may be the broadest in terms of the material it allows the press to withhold, this decision cannot but be the impetus for further expansion of these privileges. State courts in construing such laws and the legislatures in drafting and enacting them are therefore in need of guidance from this Court as to the permissible sweep of the privilege and the kinds of constitutional interests against which they may be balanced. For example,

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* Even when no statute controls, federal courts have recognized a qualified constitutional privilege to refuse source disclosure. See, *e.g.*, *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *cert.* den. 450 U.S. 1041 (1981); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert.* dismissed 417 U.S. 938 (1974). A decision on the issues projected here would also provide guidance to courts in these jurisdictions.

in New Jersey, the privilege will be pierced when it conflicts with a criminal defendant's right to compel attendance of witnesses and production of evidence. See *In re Farber*, 78 N.J. 259, 394 A.2d 330 (1978), *cert.* den. 439 U.S. 997 (1979); see N.J.S.A. 2A:84-21.1 *et seq.* When and in what manner it will be overcome when the Fourteenth Amendment right to due process is involved, however, is very much an open question.

In this context, it bears noting that there was no constitutional compulsion under which the New Jersey legislature was bound to enact a shield law insulating the media from the obligations imposed on other litigants to produce evidence relevant to a cause of action. Indeed, this Court has traditionally rejected the suggestion that the press is exempt in some special way from rules of general application of all sorts. See, *e.g.*, *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no exemption from Federal Rules of Civil Procedure pertaining to pre-trial discovery); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) (no immunity from search warrants); *Associated Press* v. *NLRB*, 301 U.S. 103 (1937) (reporters and editors covered under National Labor Relations Act).

That the First Amendment does not command that any such privilege hold sway was also made clear in another way in *Herbert* v. *Lando*, *supra*, where this Court held there to be no constitutional privilege which would safeguard the editorial processes of the press from discovery. Noting that there was no constitutional value whatever in malicious libel and that, under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), public figure plaintiffs, like petitioners, had to establish knowing or reckless falsehood for recovery, the Court found that the thoughts and editorial processes of the alleged defamer must be open to examination lest recovery and concomitant vindication of reputation be "completely foreclosed." 441 U.S. at 160.

If such virtual immunity from suit is the result where inquiry into editorial processes only is barred, the chances for ultimate vindication of reputation for the libel plaintiff are even weaker where, as is the case under New Jersey's scheme, such processes *and* all sources are protected from inquiry. Both kinds of evidence go to the heart of a libel case and both bear critically on petitioners' burden of proving actual malice and lack of good faith. Indeed, it is difficult to conceive of other evidence which is any more relevant; therefore, where, as here, it has been denied, the opportunity to prevail is, to say the least, diminished. This then is the answer to any claim by respondent that this case is not over or that the issues here are not ripe for review* because the Supreme Court of New Jersey has remanded it for trial proceedings. Under the terms of the remand, such a trial may well be a futile exercise for petitioners.

As noted above, state-created rights have made the petitioners' interest in their reputation paramount. Without an intact reputation, they will be foreclosed from continuing in their chosen business. In fact, it was the State of New Jersey which virtually impelled them to undertake the present proceeding. Under the circumstances, it is nothing if it is not arbitrary and unreasonable for the state to foreclose the opportunity to vindicate that right through the operation of other provisions of its statutes.

A writ of certiorari should therefore issue to clarify the sweep of *Paul* v. *Davis,* so that this Court may make plain precisely the range of interests which, when added to repu-

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* Actually, the issue is plainly ripe because the judgment of the Supreme Court of New Jersey on the federal issues is unreviewable except in this Court and because, if they do not appeal now, petitioners will lose all opportunity for review. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975).

tation, make for a federal cause of action. The decision appealed from reads *Paul* much too expansively.

Finally, this case warrants review because the limits to which a state may go to establish evidentiary privileges in the areas involved here, which implicate and are based on no particular constitutional provision, are far from obvious. Clearly, the privilege must give way even in the civil case if constitutional values are impinged upon. The importance and far-reaching effect of such issues beyond these parties and these circumstances are evident.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari to the Supreme Court of New Jersey should be granted.

Respectfully submitted,

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